United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL 77-7188

To be argued by
LAURENCE B. JONES

B

P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

REGAL HEALTH SPA, INC.,

Plaintiff-Appellant,

-against-

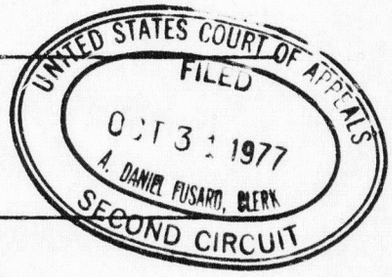
JEREMIAH T. WALSH, as Commissioner of The City of New York, Department of Buildings, PAUL O'DWYER, as President of the New York City Council, HONORABLE LOUIS J. LEFKOWITZ, as Attorney General of the State of New York, and HONORABLE HUGH CAREY, as Governor of the State of New York,

Defendants,

JEREMIAH T. WALSH,

Defendant-Appellee.

On Appeal from an Order and Judgment of the United States District Court for the Southern District of New York



APPELLEE'S BRIEF

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APPELLEE'S BRIEF

Preliminary Statement

This is an appeal from an order and judgment of the United States District Court for the Southern District of New York (McMAHON, J.), entered April 12, 1977, which denied appellant's motion for a preliminary injunction and granted appellee's cross-motion to dismiss the complaint for failure to state a claim upon which relief can be granted. This action is brought pursuant to the Civil Rights Act, 41 U.S.C. §1983, seeking to have Section 81-021 of the New York City Zoning Resolution declared unconstitutional.

Issue Presented

1. Whether this action was properly dismissed in the District Court, where a proceeding in the criminal court of the State of New York had been commenced against appellant for violation of the challenged zoning resolution

Facts

On January 8, 1976, the New York City Board of Estimate enacted into law several amendments to the Zoning Resolution of the City of New York (A23).* These amendments were designed to deal with the proliferation of physical culture establishments in New York City in general and in the Special Theatre** and Special Clinton Districts in particular (A23). Section 81-021 of the Zoning Resolution provides for the amortization of all existing physical culture establishments within the Special Theatre District within one year of its enactment unless the use conforms

*Numerals in parentheses refer to pages of the Joint Appendix.

**The approximate boundaries of the Special Theatre District are from 40th to 57th Streets and the Avenue of the Americas to Eighth Avenue.

to certain locational requirements therein.*

A week after the passage of this zoning resolution, appellant purchased a leasehold interest in a physical culture establishment at 135 West 45th Street, which is in this area (A5, 12).

On March 9, 1977, appellee served appellant with a Notice of Violation of the Zoning Resolution and demanded that all non-conforming uses terminate (A17, 52).

Appellant commenced this action on March 18, 1977 by filing a complaint asking that the Zoning Resolution be declared unconstitutional as violative of the Equal Protection and Due Process clauses of the 14th Amendment and that appellee be enjoined from its enforcement (A6-8).

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*Section 81-021 provides:

When permitted by the underlying district regulations, physical culture or health establishments, however described or advertised, including without limitation, reducing salons, massage establishments or steam baths, are restricted to locations in transient hotels with 200 rooms or more provided that no such use and no accessory business sign fronts upon a street or public way and community facilities or buildings predominantly occupied by a community facility. Where such physical culture or health establishments contain any of the following regulation size sports facilities: basketball courts, handball courts, tennis courts or a swimming pool of a minimum 1,500 sq. ft., such location restricton shall not apply. Where a use is rendered non-conforming by such locational restrictions, and where such use does not occupy at least 4,500 sq. ft. on one floor as of October 1, 1975, such use shall terminate not later than one year after the effective date of such restriction, and thereafter the space formerly occupied by such use shall be used only for a conforming use (emphasis in original).

Appellant continued to operate the premises as a non-conforming physical culture establishment and did not change its facilities in order to comply with Section 81-021. On March 21, 1977, after a follow-up inspection had been conducted, appellant was served with a summons to appear in New York City Criminal Court to answer for its continued violation of the Zoning Resolution and for its failure to comply with the directives of the earlier violation order (53)*. In addition, appellee commenced an action to enjoin the continued violation of Section 81-021 in New York State Supreme Court, New York County (Walsh v. Regal Health Spa Inc., Index No. 40977/1977).**

*Zoning Resolution 11-60 VIOLATIONS

> The owner, general agent, lessee, or tenant of any building or other structure in which a violation of this resolution has been committed or shall exist shall be guilty of a misdemeanor.
>
> Any such person, having been served with an order to remove any such violation, who shall fail to comply with such order within ten days after such service or who shall continue to violate any provision of this resolution in the respect named in such order shall be guilty of a misdemeanor.
>
> In addition to the foregoing remedies, the City may maintain an action for an injunction to restrain any violation of such resolution.

**On June 21, 1977, Hon. Thomas Hughes granted appellant's motion to dismiss the complaint on the ground that appellee had failed to exhaust his administrative remedies because he had not applied to the Board of Standards and Appeals to vacate appellant's Certificate of Occupancy. A notice of appeal was filed and on August 30, 1977, appellee moved to reargue. This motion is currently sub judice.

On March 24, 1977, appellee made a cross-motion in this proceeding to dismiss the complaint for failure to state a claim upon which relief can be granted (A23-26).

Opinion Below

The District Court granted the cross-motion to dismiss stating (A59-60):

> "Upon consideration of the record before it, this Court finds that there presently is pending in the Courts of the State of New York a criminal action wherein the (appellant) has the opportunity to litigate its constitutional claims, that the (appellant) has by virtue of that pending state criminal action an adequate remedy at law and that the (appellant) has failed to allege or show any special circumstances to warrant federal interference therein by means of injunctive or declaratory relief. The zoning ordinance challenged in this action is one which is of great importance to the City of New York and this Court shall decline to exercise jurisdiction under the principles of comity and federalism recognized in Younger v. Harris, 401 U.S. 37 (1971), Samuels v. Mackell, 401 U.S. 66 (1971), Hicks v. Miranda, 422 U.S. 332 (1975) and Juidice v. Vail, 45 U.S.L.W. 4260."*

*By consent of the parties, the action was dismissed as to defendants O'Dwyer, Lefkowitz and Carey (Appellant's brief at 6).

ARGUMENT

THE COMPLAINT WAS PROPERLY DISMISSED PURSUANT TO YOUNGER v. HARRIS, 401 U.S. 37 (1971), BECAUSE THERE IS A STATE CRIMINAL PROCEEDING PENDING WHEREIN APPELLANT CAN FULLY LITIGATE THE CONSTITUTIONAL CLAIMS.

In Younger v. Harris, 401 U.S. 37 (1971), the United States Supreme Court held that federal courts should abstain from intervention in pending state criminal proceedings where the state defendant has an adequate forum to raise his constitutional claims. See also Trainor v. Hernandez, 97 S. Ct. 1911, 1916 (1977); Juidice v. Vail, 97 S. Ct. 1211, 1216-17 (1977); Doran v. Salem Inn., Inc., 422 U.S. 922 (1975); Huffman v. Pursue, Ltd., 420 U.S. 592, 599-602 (1975);* Samuels v. Mackell, 401 U.S. 66 (1971); Canal Theatres, Inc. v. Murphy, 473 F. 2d 4, 6 (2nd Cir., 1973).

The reasoning behind this rule is twofold. "One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief". Younger, supra at 43-44. The second, and "even more vital" consideration

*Huffman involved the propriety of a federal injunction against the execution of a judgment entered in a pending state civil suit brought by the State to enforce a nuisance statute. Although the state suit was a civil rather than a criminal proceding, Younger principles were held to require dismissal of the federal suit based upon comity. See Trainor v. Hernandez, 97 S. Ct. 1911, 1918 (1977).

is the notion of comity. In Younger at 44, the Supreme Court described comity as follows:

> "A proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."

This case is controlled by Younger because there is a currently pending state criminal proceeding which affords appellant the opportunity to raise and have adjudicated its constitutional claims.

Although the state criminal proceedings were instituted three days after appellant filed the complaint in this action, the complaint was still properly dismissed. "Where state court proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in federal court, the principles of Younger v. Harris should apply in full force". Hicks v. Miranda, 422 U.S. 332, 349 (1975). See also Doran v. Salem Inn Inc., 422 U.S. 922, 929 (1975). Appellee had not filed any papers in the instant case when the state criminal proceedings were instituted on March 21. The only federal proceeding which had taken place by that date was a brief hearing at which appellant's application for a temporary restraining order was denied.

Surely, that hearing can not be considered a "proceeding of substance on the merits" so as to take this case out of the reach of Younger. Having violated the zoning resolution and having disobeyed the directives of the violation order, appellant can not now be heard to complain that its constitutional claims are to be resolved in state court. Doran, supra at 929.

The principles enunciated in Younger do not apply "where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph and in whatever manner and against whomever an effort might be made to apply it'." Huffman v. Pursue, Ltd., 420 U.S.592, 611 (1975). Appellant has failed to demonstrate that this case comes within either of these two exceptions.

In order to qualify under the first exception, appellant must demonstrate "proven harassment or prosecution undertaken by state officials in bad faith without hope of obtaining a valid conviction." Perez v. Ledesma, 401 U.S. 82, 85 (1971). There is nothing in the record to suggest that the authorities undertook the prosecution other than in a good faith attempt to enforce the zoning law. See Perez, supra, at 85. It does not appear that appellant has been threatened with any injury other than that incidental to every criminal proceeding brought law-

fully and in good faith. . . ." Douglas v. City of Jeanette, 319 U.S. 157, 164 (1943). That type of injury could not justify federal interference. Trainor v. Hernandez, 97 S. Ct. 1911, 1917 n. 7 (1977). See also Younger, supra at 46.

In regard to the second exception, it would be most unreasonable to characterize the zoning resolution in such a manner. Although appellant alleges that the resolution is unconstitutional, that is not enough. The resolution can hardly be said to exhibit the requisite degree of facial unconstitutionality necessary to warrant federal intervention in light of the pronouncement of the Supreme Court that zoning regulations will be upheld so long as the legislation is "reasonable, not arbitrary" and bears "a rational relationship to a [permissible] state objective". See Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974).

Appellant argues at p. 15 of the brief that "State administrative officers are not entitled to the application of the same principles of comity, as are the State judiciary". Although the import of this statement is not totally clear, it seems to imply that Younger is inapplicable because of the status of parties involved. This argument is clearly without merit because the only prerequisite for Younger to be invoked is a state criminal proceeding wherein appellant can, as here, have its constitutional claims litigated.

Appellant also contends at p. 15 of its brief that Younger does not apply because the only sanction which can be imposed in the criminal proceeding is a fine. There is no language in Younger or its progeny which even suggests that the type of punishment is a factor in a federal court's decision whether or not to interfere. As was noted in Juidice v. Vail, 97 S. Ct. 1211, 1217 (1977), the most vital consideration behind non-intervention is the notion of comity. Comity exists regardless of the sanction involved. In fact, in its most recent decision in this area, the Supreme Court in Trainor v. Hernandez, 97 S. Ct. 1911 (1977), held that the principles of Younger and Huffman were applicable to bar federal court interference with a state civil enforcement suit instituted solely to recover welfare payments alleged to have been wrongfully received.

Appellant tries to draw an analogy between its position and that of the appellant in Wooley v. Maynard, 97 S. Ct. 1428 (1977), wherein the Supreme Court held that a district court was not precluded by Younger from exercising jurisdiction. That case is readily distinguishable on its facts because the relief was wholly prospective, to be free from prosecution for future violations of the statute, as appellant therein had already been convicted and had served a sentence of imprisonment for his prior offenses. See Wooley, 97 S. Ct. at 1433. Here with a criminal prosecution pending, appellant to trying to avoid conviction.

Plaintiff, also cites Black Jack Distributors Inc., v. Beame, 433 F. Supp. 1297 (S.D.N.Y. 1977), as authority against abstention. The distinctions between that case and the instant proceeding are perhaps best described in Sophisticated Health Spa Inc., v. Baumgarten, 77 Civ. 4469 (S.D.N.Y. September 16, 1977), wherein the District Court stated:

> "Black Jack. . . involved obscenity prosecution against bookstores and necessarily raised substantial First Amendment issues not present in the instant case. In addition, Black Jack did not involve a pending state prosecution against the particular federal plaintiff. See Wooley v. Maynard, 97 S. Ct. 1428 (1977). Moreover, Judge Cannella found evidence of discriminatory law enforcement conducted by the authorities in bad faith. As such, Black Jack followed a line of authority highlighted by Dombrowski v. Pfister, 380 U.S. 479 (1965) in issuing an injunction forbidding the enforcement in bad faith of obscenity laws for the purpose of harassing the plaintiff booksellers. The instant case is not similar."

CONCLUSION

The order and judgment of the District Court should be affirmed, with costs.

October 31, 1977.

Respectfully submitted,

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321-1M-421040(53)

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

City, County and State of New York, ss.: BRIAN SUSSDEN

being duly sworn, says, that on the 31 day of OCT., 1977

at No. 125-10 QUEENS BLVD. in the Borough of QUEENS in The City of New York, he served three copies

of the annexed APPELLEE'S BRIEF upon ANTHONY V. LOMBARDINO Esq.,

the attorney for the PLTFF-APPLT. in the within entitled action by delivering

three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and

leaving the same with him.

Sworn to before me, this 31
day of OCT., 1977

Brian Snyder

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1786
Commission Expires May 1, 1978

Bruce Garner